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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DAVID WEBER,

Plaintiff,

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

Civil No. 10-6068-AA  
OPINION AND ORDER

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AIKEN, Chief Judge:

Claimant, David Weber, brings this action pursuant to the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner. The Commissioner denied plaintiff's application for Title XVI supplemental security income (SSI) disability benefits under the Act. For the reasons set forth below, this case is remanded for further proceedings.

#### **PROCEDURAL BACKGROUND**

On July 19, 2000, plaintiff filed his third application for SSI. Tr. 37. On October 25, 2002, an administrative law judge (ALJ) denied the claim and on March 7, 2005, the United States District Court affirmed the decision of the Commissioner. Id.

On October 12, 2004, plaintiff filed an application for SSI. Tr. 20. After the application was denied initially, and upon reconsideration, plaintiff timely requested a hearing before an ALJ. Tr. 20. On July 17, 2007, an ALJ hearing was held before the Honorable John L. Madden. Tr. 20-33. A supplemental hearing was held on October 26, 2007. Tr. 437-75. On December 21, 2007, ALJ Madden issued an unfavorable decision, finding plaintiff not disabled within the meaning of the Act. Tr. 20-33. After the Appeals Council declined to review the ALJ decision, plaintiff filed a complaint in this Court. Tr. 6-9.

### STATEMENT OF THE FACTS

Born in 1965, plaintiff was 25 years old on the alleged onset date of disability, and 42 years old at the time of the hearing. Tr. 15, 20. According to plaintiff's testimony, he completed the 9th grade, but did not complete high school or pursue a GED. Tr. 441. Plaintiff has no relevant work experience. Tr. 32. He alleges disability beginning June 1990, due to osteoporosis, degenerative disc disease, fibromyalgia, arthritis, irritable bowel syndrom, major depression, post traumatic stress disorder, and social anxiety disorder. Tr.123-24.

A vocational expert (VE) testified at the hearing. The VE opined that there were light exertion jobs available in the local economy that plaintiff could perform. Tr. 463-73.

### STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to

establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant has a "medically severe impairment or combination of impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not disabled.

In step three the Secretary determines whether the impairment meets or equals "one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity." Id.; see 20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively presumed disabled; if not, the Secretary proceeds to step four. Yuckert, 482 U.S. at 141.

In step four the Secretary determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can work, she is not disabled. If she cannot perform past relevant work, the burden shifts to the Secretary. In step five, the Secretary must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the Secretary meets this burden and proves that the claimant is able to perform other work which exists in the national economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

## **DISCUSSION**

### I. The ALJ's Findings

At step one of the five step sequential evaluation process outlined above, the ALJ found that plaintiff had not engaged in substantial gainful activity since the alleged onset date. Tr. 23, Finding 1. This finding is not in dispute. At step two, the ALJ found that plaintiff had the following severe impairments: mild compression fractures of the lumbar spine; dysthymia; marijuana dependence; and borderline intellectual functioning. Tr. 23, Finding 2. This finding is not in dispute. At step three, the ALJ found that plaintiff's impairments, either singly or in combination, did not meet or equal the requirements of a listed impairment. Tr. 23, Finding 3. This finding is not in dispute.

The ALJ determined that plaintiff had the residual

functional capacity (RFC) to perform work at a light exertion level. Tr. 24, Finding 4. Plaintiff was limited to work that would require only occasional stooping, bending, or crouching. Id. The ALJ further noted that plaintiff was incapable of following detailed instructions and that plaintiff was restricted to work that involved only limited to occasional co-worker contact, no contact with the general public, and no exposure to heights, ropes, or scaffolds. Id. This finding is in dispute.

The ALJ concluded that plaintiff's allegations were not entirely credible because the objective medical evidence did not support his alleged limitations, examining and treating medical sources documented questions of credibility, and he did not regularly or consistently seek treatment for his alleged back pain. Tr. 28, 29. This finding is not in dispute.

At step four, the ALJ acknowledged that plaintiff has no past relevant work. Tr. 32, Finding 5. This finding is not in dispute. Finally, at step five, the ALJ found that there are jobs that exist in significant numbers in the national and local economy that plaintiff could perform. Tr. 32, Finding 9. This finding is in dispute as it relates to the ALJ's assessment regarding plaintiff's RFC.

## II. Plaintiff's Allegations of Error

Plaintiff challenges the ALJ's decision on three grounds. First, plaintiff argues that although the ALJ fully credited the opinion of examining psychologist, David Northway, Ph.D., the ALJ failed to include all of the limitations prescribed by Northway

in his evaluation of plaintiff's RFC. Second, plaintiff argues that the ALJ failed to provide sufficient reasons for rejecting the medical opinions of plaintiff's treating physician, Edward Reeves, M.D., and examining psychologist, David Truhn, Psy.D. Finally, plaintiff argues that he has demonstrated an increased severity in his impairments since the last SSI decision.

This court notes that the Commissioner concedes the following errors: (1) the ALJ erred when he accepted Dr. Northway's medical opinion but did not fully incorporate his opinion into the residual functional capacity finding; (2) the ALJ erred in utilizing his interpretation rather than ascertaining Dr. Northway's interpretation regarding the meaning of a "moderate" limitation; (3) the ALJ erroneously rejected Dr. Truhn's finding of marked limitations; and (4) the ALJ incorrectly found that plaintiff failed to satisfy his burden to demonstrate changed circumstances in his condition from the previous decision. Such errors are not harmless.

When a decision denying disability benefits is reversed, an award of benefits may be directed "where the record has been fully developed and where further administrative proceedings would serve no useful purpose." Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996). That is not the case here. Given plaintiff's acknowledged credibility issues in conjunction with the clear conflicts between the various medical opinions regarding the severity of plaintiff's impairments and his ability to work, I cannot make a final disability determination at this

time. Moreover, the vocational expert was not consulted regarding Dr. Northway's complete medical opinion when determining plaintiff's ability to work. Accordingly, I remand for further development of the record.

Notwithstanding the disposition of this case, this court will address plaintiff's allegation of error regarding Dr. Reeves. Plaintiff asserts that the ALJ erred by providing legally insufficient reasons for rejecting the opinion of treating physician, Edward Reeves, M.D. I disagree.

Generally, a treating physician's opinion is afforded the greatest weight in disability cases (20 C.F.R. § 404.1527(d)(2)); however, the opinion of a treating physician is not binding on an ALJ "with respect to the existence of an impairment or the ultimate determination of disability." Batson v. Comm'r of the Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004). Rather, an ALJ may "discredit treating physicians' opinions that are conclusory, brief, and unsupported by the record as a whole...or by objective medical findings." Id. (internal citations omitted).

Here, it is undisputed that Dr. Reeves was plaintiff's treating physician from June 1, 2000, through November 11, 2004. Tr. 220-273. On November 15, 2004, Dr. Reeves filled out an RFC form regarding plaintiff in which he limited plaintiff to less than sedentary work, standing two hours in an eight hour day, and sitting less than six hours in an eight hour day; however, his corresponding treatment notes do not provide objective medical evidence of the limitations asserted in his RFC report. The ALJ



recognized that treatment notes indicate "chronic low back pain," and "mild degenerative changes throughout the thoracic spine." Tr. 26, 233-4. Nevertheless, Dr. Reeves opined that a February 2004 thoracic x-ray looked "pretty normal." Tr. 233. In fact, Dr. Reeves concluded that multiple medications had not helped plaintiff in the past, and he wrote, "I told him I really don't have much to offer him." Tr. 26.

Plaintiff points to additional treatment notes in August and September 2004 that indicate plaintiff continued to suffer from "severe pain" in his mid to low back as well as worsening migraines. Tr. 228. Notes from the same day also indicate that plaintiff's "left knee pain" was "worsening" and that it was "swollen and clunking." *Id.* Nonetheless, plaintiff fails to provide any diagnostic findings that substantiate his continued complaints. Further, although the ALJ erroneously concluded that Dr. Reeves' RFC assessment was completed "nearly 10 months after his last assessment," I find that the error was harmless because none of the additional treatment notes, nor the record as a whole, support the findings stated in his RFC assessment. Stout v. Comm'r of Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (mistakes that are "nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion" are harmless error). In fact, treatment notes from Scott Kitchell, M.D., taken on November 2, 2004, discuss plaintiff's "progressing degenerative disc disease" as well as his "mild compression fracture;" yet, Dr. Kitchell explained he did not believe

plaintiff would benefit from surgery, nor did he believe plaintiff was "100% disabled from all forms of work," although heavy labor was excluded. Tr. 26, 197.

Because Dr. Reeves merely checked a box on the RFC form, which was conclusory and brief in form, without providing "medical rationale as to why he restricted [plaintiff] to sedentary work," and because his objective medical findings, as well as the record as a whole, failed to support his RFC assessment, the ALJ properly discounted Dr. Reeves' medical opinion.

#### **CONCLUSION**

The Commissioner's decision is not based on substantial evidence in the record and is therefore reversed and remanded for further development of the record as stated above.

IT IS SO ORDERED.

Dated this 9 day of June 2011.

A handwritten signature in cursive script, appearing to read "Ann Aiken", is written over a horizontal line.

Ann Aiken  
United States District Judge